

Maine Revised Statutes
Title 13-C: MAINE BUSINESS CORPORATION ACT
Chapter 11: MERGERS AND SHARE EXCHANGES

§1110. RIGHT OF SHAREHOLDERS TO RECEIVE PAYMENT FOR SHARES FOLLOWING CONTROL TRANSACTION

1. Shareholders entitled to rights; exceptions. A holder of the voting shares of a corporation that becomes the subject of a control transaction described in subsection 2 is entitled to the rights and remedies provided in this section, unless the articles of incorporation provide that this section is not applicable to the corporation.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

2. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Controlling person" means:

- (1) A person who has, or a group of persons acting in concert that has, voting power over voting shares of the corporation that entitle the holders of those shares to cast at least 25% of the votes that all shareholders are entitled to cast in an election of the directors of the corporation; or
- (2) A person who has, or a group of persons acting in concert that has, voting power over at least 25% of the shares in any class of shares entitled to elect all the directors, or any specified number of them.

Notwithstanding this paragraph, a person or group of persons that would otherwise be a controlling person within the meaning of this subsection is not considered a controlling person unless, subsequent to the effective date of this section, that person or group increases the percentage of outstanding voting shares of the corporation over which that person or group has voting power to a percentage in excess of the percentage of outstanding voting shares of the corporation over which that person or group had voting power on the effective date of this section, and to at least the amount specified in this paragraph.

For the purposes of this section, a person is not a controlling person if that person holds voting power, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee or trustee for one or more beneficial owners who do not individually or, if they are a group acting in concert, as a group have the voting power specified in this paragraph or who are not considered a controlling person under this paragraph. A person has voting power over a voting share if that person has or shares, directly or indirectly, through any option, contract, arrangement, understanding, voting trust, conversion right or relationship, or by acting jointly or in concert or otherwise, the power to vote, or to direct the voting of, that voting share.

A person engaged in business as an underwriter or group consisting of persons engaged in business as underwriters is not a controlling person under this paragraph if that person or group holds voting power specified in this paragraph, in good faith and not for the purpose of circumventing this section, over shares of the corporation acquired through participation in good faith in a firm commitment underwriting of an offering of shares registered under the United States Securities Act of 1933. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

B. "Control transaction" means the acquisition by a person or group of the status of a controlling person. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

C. "Control transaction date" means the date on which a controlling person becomes a controlling person. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

D. "Demanding shareholder" means a shareholder who has made a demand for payment pursuant to subsection 4. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

3. Notice of control transaction to be given to shareholders. Within 15 days of the control transaction date, notice that a control transaction has occurred must be given by the controlling person to each shareholder of the corporation holding voting shares. If the controlling person so requests, the corporation shall, at the option of the corporation and at the expense of the controlling person, either furnish a list of all shareholders holding voting shares to the person or group or mail the notice to those shareholders. A copy of this section of law must be included in, or enclosed with, the notice. Any list provided by the corporation to a controlling person pursuant to this subsection may be used only for the purpose of giving the notice required by this subsection.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

4. Shareholder demand for payment. After the control transaction date, any holder of voting shares of the corporation, prior to or within 30 days after the notice required by subsection 3 is given, which time period must be specified in the notice, may make written demand on the controlling person for payment of the amount provided in subsection 5 with respect to the voting shares of the corporation held by the shareholder, and the controlling person shall pay that amount to the shareholder. The demand of the shareholder must state the number and class or series, if any, of the shares owned by the shareholder with respect to which the demand is made.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

5. Shareholder entitled to receive payment for shares. A shareholder making written demand under subsection 4 is entitled to receive cash for each of the shareholder's shares in an amount equal to the fair value of each voting share as of the day prior to the control transaction date, taking into account all relevant factors, including an increment representing a proportion of any value payable for acquisition of control of the corporation.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

6. Submission of certificates; notation. At the time the shareholder files demand for payment for shares pursuant to subsection 4, or within 20 days after filing the demand, each shareholder demanding payment with respect to certificated shares shall submit the certificate or certificates representing the shareholder's shares to the corporation or the corporation's transfer agent for notation on the certificate that the demand has been made; the certificates must be returned promptly after entry of the notation. A shareholder's failure to submit the certificates terminates, at the option of the controlling person, the shareholder's rights under this section, unless a court of competent jurisdiction, for good and sufficient cause shown, otherwise directs. If shares represented by a certificate on which notation has been so made are transferred, each new certificate issued for those shares must bear a similar notation, together with the name of the original holder of the shares who made the written demand, and a transferee of the shares does not acquire by the transfer any rights in the corporation other than those that the original demanding shareholder had after making demand for payment of the fair value of the shares.

Following a demand for payment with respect to shares without certificates, a notation that a demand for payment pursuant to subsection 4, together with the name of the original holder of the shares who made the written demand, must be included in the information statement required by section 627, subsection 2. A transferee of shares without certificates as to which a notation is included in the information statement

required by section 627, subsection 2 does not acquire by the transfer any rights in the corporation other than those that the original demanding shareholder had after making demand for payment of the fair value of the shares.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

7. Written offer; balance sheet. Within 10 days after the expiration of the period provided in subsection 4 for making demand, the controlling person shall make a written offer to each demanding shareholder to pay for those shares at a specified price determined by the controlling person to be the fair value of those shares. The offer must be made at the same price per share to all demanding shareholders of the same class. The notice and offer must be accompanied by a balance sheet of the corporation as of the latest available date and not more than 12 months prior to the making of the offer and a profit and loss statement of the corporation for the 12-month period ending on the date of the balance sheet.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

8. Agreement on fair value; payment. If, within 30 days after the expiration of the period provided in subsection 4 for making demand, the fair value of the shares is agreed upon between any demanding shareholder and the controlling person, payment for those shares must be made within 90 days after the date on which the written offer required by subsection 7 is made, upon surrender of the certificate or certificates representing those shares, if certificated. Upon payment of the agreed value, the demanding shareholder ceases to have any interest in the shares.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

9. Failure to reach agreement on fair value of shares. If, within the additional 30-day period prescribed by subsection 8, one or more demanding shareholders and the controlling person have failed to agree as to the fair value of shares:

A. The controlling person may, or shall, if the controlling person receives a demand as provided in subparagraph (1), bring an action in the Superior Court in the county in this State where the registered office of the corporation is located asking that the fair value of those shares be found and determined. This action:

(1) Must be brought by the controlling person, if the controlling person receives a written demand for suit from any demanding shareholder, which demand is made within 60 days after the date on which the written offer required by subsection 7 was made. The controlling person shall bring the action within 30 days after receipt of the written demand; or

(2) In the absence of a demand for suit, may be brought by the controlling person at that controlling person's election at any time from the expiration of the additional 30-day period prescribed by subsection 8 until the expiration of 60 days after the date on which the written offer required by subsection 7 was made; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

B. If the controlling person fails to institute the action within the period specified in paragraph A, a demanding shareholder may bring the action in the name of the controlling person; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

C. An action may not be brought, either by the controlling person or by a demanding shareholder, more than 6 months after the date on which the written offer required by subsection 7 was made; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

D. In any action, whether initiated by the controlling person or by a demanding shareholder, all demanding shareholders, wherever residing, except those who have agreed with the controlling person upon the price to pay for their shares, must be made parties to the proceeding as an action against their shares quasi in rem. A copy of the complaint must be served on each demanding shareholder who is a resident of this State as in other civil actions and must be served by registered or certified mail or by

personal service outside the State on each demanding shareholder who is a nonresident. The jurisdiction of the court is plenary and exclusive; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

E. For each demanding shareholder for whom the controlling person has brought an action for the determination of the value of the shares, the court shall determine whether that demanding shareholder has satisfied the requirements of this section and is entitled to receive payment for the demanding shareholder's shares; the burden is on that shareholder to prove that the shareholder is entitled to receive payment. The court shall then proceed to fix the fair value of the shares. The court may appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers have the power and authority specified in the order of their appointment or an amendment to the order of appointment; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

F. All shareholders who are parties to the proceedings are entitled to judgment against the controlling person for the amount of the fair value of their shares, except for any shareholder whom the court has determined is not entitled to receive payment for the shareholder's shares. The judgment may be payable only upon and concurrently with the surrender to the controlling person of the certificate or certificates representing those shares, if certificated. Upon payment of the judgment, the demanding shareholder ceases to have any interest in those shares; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

G. The judgment must include an allowance for interest at a rate the court finds fair and equitable in all the circumstances, from the control transaction date to the date of payment. If the court finds that the refusal of any shareholder to accept the controlling person's offer of payment for that shareholder's shares was arbitrary, vexatious or not in good faith, the court may in its discretion refuse to allow interest to that shareholder; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

H. The costs and expenses of a proceeding must be determined by the court and assessed against the controlling person, but all or part of those costs and expenses may be apportioned and assessed as the court determines equitable against any or all of the demanding shareholders who are parties to the proceeding to whom the controlling person has made an offer to pay for the shares if the court finds that the action of those shareholders in failing to accept that offer was arbitrary, vexatious or not in good faith. Those expenses must include reasonable compensation for and reasonable expenses of the appraisers, but exclude the fees and expenses of counsel for any party and must exclude the fees and expenses of experts employed by any party, unless the court otherwise orders for good cause. The court shall award each shareholder who is a party to the proceeding reasonable compensation for any expert employed by the shareholder in the proceeding and the shareholder's reasonable attorney's fees and expenses, if:

(1) No offer was made; or

(2) The fair value of the shares as determined materially exceeds the amount that the controlling person offered to pay for the shares; and [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

I. At all times during the pendency of any proceeding, the court may make any order that is necessary to protect the corporation, the controlling person or the demanding shareholders, or that is otherwise just and equitable. Those orders may include, without limitation, orders:

(1) Requiring the controlling person to pay the court, or post security for, the amount of the judgment or its estimated amount, either before final judgment or pending appeal;

(2) Requiring the deposit with the court of certificates representing certificated shares held by the demanding shareholders;

(3) Imposing a lien on the property of the controlling person to secure the payment of the judgment, which lien may be given priority over liens and incumbrances contracted by the controlling person after the control transaction date; and

(4) Staying the action pending the determination of any similar action pending in another court having jurisdiction. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

10. Holding and disposal of shares acquired by payment. Shares acquired by a controlling person pursuant to payment of the agreed value for the shares or to payment of the judgment entered, as provided in this section, may be held and disposed of as authorized and issued shares.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

11. Minors. In the case of a shareholder who is a minor or otherwise legally incapacitated, the demand required by subsection 4 may be made either by the shareholder, notwithstanding the shareholder's legal incapacity, by the shareholder's guardian or by any person acting for the shareholder as next friend. The shareholder is bound by the time limitations set forth in this section, notwithstanding the shareholder's legal incapacity.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

12. Appeals. Appeals from judgments in actions brought under this section are permitted as in other civil actions in which equitable relief is sought.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

13. Compliance; shareholder rights. If a person or group of persons proposing to engage in a control transaction complies with the requirements of this section in connection with the control transaction, the effectiveness of the rights afforded in this section to shareholders may be conditioned upon the consummation of the control transaction.

The person or group of persons shall give prompt written notice of the satisfaction of any condition under this subsection to each shareholder who has made demand as provided in this section.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

14. Application. This section does not apply to:

A. Any corporation that is the subject of a control transaction and that does not have a class of voting shares:

(1) Registered or traded on a national securities exchange; or

(2) Registered with the Securities and Exchange Commission pursuant to the Act of Congress known as the Securities Exchange Act of 1934, as that Act has been or may be amended; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

B. A person or group that inadvertently becomes a controlling person if that controlling person divests itself of a sufficient amount of its voting shares so that it is no longer a controlling person, as soon as practicable, but in no event more than 30 days after that person or group receives notice from the corporation that it has become a controlling person, or to any corporation that is the subject of a control transaction and that on the effective date of this section was a subsidiary of any other corporation. For purposes of this paragraph, "subsidiary" means any corporation as to which any other corporation has acquired or has the right to acquire, directly or indirectly, through the exercise of warrants, options and rights and the conversion of all convertible securities, whether issued or granted by the subsidiary or otherwise, voting power over voting shares of the subsidiary that would entitle the holders of those shares to cast in excess of 50% of the votes that all shareholders are entitled to cast in the election of

directors of that subsidiary; except that a subsidiary does not cease to be a subsidiary as long as the corporation remains a controlling person within the meaning of subsection 2; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

C. Any person or group that becomes a controlling person solely as a result of the corporation's purchase or redemption of its own voting shares; or [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

D. Any corporation incorporated prior to the effective date of this section that was not subject to former Title 13-A, section 910 as it existed immediately prior to the effective date of this section because that corporation had adopted the provision in its bylaws described in former section 910, subsection 1, paragraph A or had adopted the provision in its articles of incorporation described in former section 910, subsection 1, paragraph B, if in either case that provision is not subsequently rescinded by an amendment to the articles of incorporation. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

SECTION HISTORY

2001, c. 640, §A2 (NEW). 2001, c. 640, §B7 (AFF).

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